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Nos. 99-1687, 99-1728

IN THE

Supreme Court of the United States

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,
Petitioners,

v.

FREDERICK W. VOPPER, *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

FREDERICK W. VOPPER, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONERS GLORIA BARTNICKI and ANTHONY F. KANE, JR.

JEREMIAH A. COLLINS
(Counsel of Record)
BREDHOFF & KAISER, P.L.L.C.
805 15th Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 842-2600

RAYMOND P. WENDOLOWSKI
SCOTT C. GARTLEY
CYNTHIA R. VULLO
KOFF, WENDOLOWSKI, FERGUSON & MANGAN
22 East Union Street, Suite 115
Wilkes-Barre, PA 18701-2721
(570) 822-5600

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTION PRESENTED

Whether the federal and Pennsylvania wiretapping statutes violate the First Amendment insofar as they prohibit the disclosure or other use of an unlawfully intercepted electronic communication by a person who was not involved in the interception itself, but who knows or has reason to know that the communication was unlawfully intercepted.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Gloria Bartnicki and Anthony F. Kane, Jr., were plaintiffs in the District Court and appellees in the Court of Appeals. Respondents Frederick W. Vopper, a/k/a Fred Williams; Keymarket of NEPA, Inc., d/b/a WILK Radio; Lackazerne, Inc., d/b/a WGBI Radio; and Jack Yocum were defendants in the District Court and appellants in the Court of Appeals. The complaint also named as defendants a Jane Doe and John Doe, who were named as appellants in the Court of Appeals. Petitioner United States of America appeared as an intervenor of right in the Court of Appeals pursuant to 28 U.S.C. § 2403(a).

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BRIEF FOR PETITIONERS GLORIA BARTNICKI AND ANTHONY F. KANE, JR.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 200 F.3d 109 (3d Cir. 1999), and is reprinted in the appendix to the Petition for Certiorari in No. 99-1728 ("Pet. App.") at 1a-58a. The opinion of the United States

District Court for the Middle District of Pennsylvania denying respondents' motions for summary judgment is unreported and is reprinted at Pet. App. 59a-68a. The opinion of the District Court denying reconsideration of that ruling is unreported and is reprinted at Pet. App. 70a-74a.

JURISDICTION

The Court of Appeals entered judgment on December 27, 1999. Timely petitions for rehearing and suggestions of rehearing *en banc* were denied on February 25, 2000. Pet. App. 82a-83a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech."

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510 *et seq.*, provides in pertinent part as follows:

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited.

(1) Except as otherwise specifically provided in this chapter any person who –

* * * *

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; [or]

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection[,]

* * * *

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

Other relevant provisions of Title III are reproduced at Pet. App. 86a-91a.

The Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons. Stat. § 5703 *et seq.*, provides in pertinent part as follows:

§ 5703. Interception, disclosure or use of wire, electronic or oral communications

Except as otherwise provided in this chapter, a person is guilty of a felony of the third degree if he:

* * * *

(2) intentionally discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; or

(3) intentionally uses or endeavors to use the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication.

* * * *

§ 5725. Civil action for unlawful interception, disclosure or use of wire, electronic or oral communication

(a) Cause of action.—Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication ....

STATEMENT OF THE CASE

A. Factual Background

Petitioner Gloria Bartnicki was employed by the Pennsylvania State Education Association ("PSEA") to provide services and assistance to PSEA affiliates representing personnel employed by various public school districts. One of those affiliates, representing teachers employed by the Wyoming Valley West School District, was in contract negotiations during 1992-94, and Bartnicki was the chief negotiator for the Wyoming Valley teachers' union. Pet. App. 2a. Petitioner Anthony Kane, a teacher at Wyoming Valley West High School, was president of the union. *Id.*

In May of 1993, Bartnicki and Kane had a telephone conversation concerning the negotiations. Kane was speaking on a conventional telephone at home; Bartnicki was in her car using a cellular phone. Pet. App. 3a. In their conversation, the two union representatives discussed strategy relating to the labor dispute, including the timing of a possible strike date. Joint Appendix ("JA") 41, 45. They expressed their candid assessments of School District representatives, noting that they "fe[lt] sorry" for one but viewed others as "nitwits," identifying one as "too nice a guy" and others a "rabble rousers." JA 45-48. Bartnicki and Kane evinced their exasperation with the fact that the School Board had been "negotiating in the paper" by telling reporters that the Board would not agree to more than a three percent pay increase for the teachers. JA 46, 47. In condemning the Board's posture, Kane stated hyperbolically: "If they're not gonna move for three percent, we're gonna have to go to their, their homes . . . [t]o blow off their front porches, we'll have to do some work on some of those guys." JA 46. Kane was speaking rhetorically, using a figure of speech; he was not making any actual threat. JA 55-56, 90, 95-96, 103-105, 133-134.

The conversation was intercepted and recorded onto a cassette tape by an unknown person, apparently using a scanner that picked up the signal from Bartnicki's cellular handset. The tape then was placed by an unknown person in the mailbox of respondent Jack Yocum, the president of the Wyoming Valley West Taxpayers' Association, an organization opposed to the teacher union's bargaining proposals. Pet. App. 2a-4a.

After listening to the tape and recognizing the voices of Bartnicki and Kane, Yocum gave a copy of the tape to respondent Frederick Vopper, who, under the name of Fred Williams, hosts a talk show carried by radio stations WILK and WGBI, which are operated by respondents Keymarket of NEPA, Inc., and Lackazerne, Inc., respectively. Pet. App. 3a-4a. Although Vopper received the tape in the Spring of 1993, he did not play it until September 30 of that year. JA 72, 76. (In the meantime, neither Kane nor any other union representative had blown up porches or engaged in any other conduct of such a nature.)

Until that broadcast, Bartnicki and Kane did not know that their conversation had been intercepted and taped. JA 131-132. It is undisputed that they intended for their conversation to remain private. The tape shows that Kane characterized the conversation as "very confidential." JA 43. Indeed, in the taped conversation, Bartnicki gave Kane both her home telephone number and her cellular carphone number. JA 42-43. Bartnicki testified that Vopper initially broadcast even the part of the tape that revealed her phone numbers, and that she immediately be-

gan "to get terrible calls after that," so that she had to change the numbers.[1] JA 106-107.

Both Yocum and Vopper realized that the conversation between Bartnicki and Kane had involved a cellular telephone, and that a scanner probably had been used to intercept the call. JA 73-75, 115. Nevertheless, Vopper played the tape in its entirety over the air on at least two occasions, JA 20, 39, and he subsequently played selected portions of the tape on numerous additional occasions. JA 64; Pet. App. 4a.[2]

B. The Federal and State Statutory Schemes

Both the United States Congress and the Pennsylvania legislature have enacted statutes that prohibit the conduct in which Yocum, Vopper, and the respondent radio stations engaged.

In 1968, Congress found that "[t]he tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized." S. Rep. No. 90-1097, 90th Cong., 2d Sess. 67 (1968).

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[1] Apparently the tape subsequently was warped so that the numbers would be indistinguishable. JA 42-43, 106.

[2] Some other members of the media had received copies of the tape before Vopper played it, but none of them played it until Vopper had done so. For example, the Wilkes-Barre Times Leader newspaper "had the tape from the spring of 93 and . . . they were not going to use it and . . . the only reason they did is because Fred [Vopper] revealed it." JA 100.

There is evidence that the journalistic practices of Vopper and WILK are far from the norm of responsible radio broadcasters. The Luzerne County District Attorney testified that WILK is so irresponsible that WILK is the only radio station to which the District Attorney's office refuses to send its press releases. JA 124-125.

> Commercial and employer-labor espionage is becoming widespread. It is becoming increasingly difficult to conduct business meetings in private. Trade secrets are betrayed. Labor and management plans are revealed. No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage. [*Id.*]

In 1986, Congress found that the development of cellular telephones, computers, and other new means of electronic communication had made the problem even worse. "[T]remendous advances in telecommunications and computer technologies have carried with them comparable technological advances in surveillance devices and techniques," increasing the risk that communications "may be open to possible wrongful use and public disclosure by . . . unauthorized private parties." S. Rep. No. 99-541, 99th Cong., 2d Sess. 3 (1986).

Congress' response to these problems was to adopt a "comprehensive scheme for the regulation of wiretapping and electronic surveillance," *Gelbard v. United States*, 408 U.S. 41, 46 (1972), expressing a "fundamental policy adopted by Congress," *id.* at 47. That statutory scheme is Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 311, as amended by the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, 18 U.S.C. § 2510 *et seq.*

Consonant with the findings made by Congress, Title III broadly prohibits both the interception of electronic communications and the subsequent use of intercepted communications. With certain enumerated exceptions for specified law enforcement activities, the statute makes it unlawful "to intercept or endeavor to intercept, any wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(a). ("Interception" is defined as "the

aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4).) And the statute contains three provisions which, together, prohibit comprehensively the subsequent use of unlawfully intercepted communications.

First, the statute prohibits in broad terms "us[ing], or endeavor[ing] to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through [unlawful] interception." 18 U.S.C. § 2511(1)(d). To make clear that *disclosure* is included among the prohibited uses of such communications, the statute specifically prohibits "intentionally disclos[ing], or endeavor[ing] to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through [unlawful] interception." 18 U.S.C. § 2511(1)(c). And a third provision makes clear that the prohibition of the use of unlawfully intercepted communications applies not only to private dealings, but to every kind of government proceeding as well – federal, state, and local. 18 U.S.C. § 2515.

In addition to criminal penalties, *see* 18 U.S.C. § 2511(4), Title III provides for a civil action by "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of [the Act]." 18 U.S.C. § 2520(a). In such a suit the plaintiff may obtain equitable or declaratory relief, damages (calculated as the greater of actual damages or specified statutory damages), "punitive damages in appropriate cases," and attorney's fees and costs. 18 U.S.C. § 2520(b), (c).

Pennsylvania – together with some forty other States (*see* the Addendum to this brief) – has enacted a Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons. Stat. § 5703 *et seq.*, which contains provisions very similar to the relevant portions of Title III. In addition to prohibiting interception, the Pennsylvania statute prohibits "intentionally us[ing] or endeavor[ing] to use the contents of any wire, electronic or oral communication . . ., knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication," *id.* § 5703(3), and "intentionally disclos[ing] or endeavor[ing] to disclose" the contents of such a communication, *id.* § 5703(2). A civil action is made available to "[a]ny person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this chapter." *Id.* § 5725(a). The remedies available under the state statute are "actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation, or $1,000, whichever is higher," punitive damages, attorney's fees and costs. *Id.*

C. Proceedings Below

Bartnicki and Kane sued Yocum, Vopper, WILK and WGBI under both the federal and statue statutes, for having used and disclosed the tape of their intercepted telephone conversation. The complaint sought actual damages, statutory or liquidated damages, punitive damages, fees and costs. JA 28, 30. Petitioners subsequently withdrew their prayer for actual damages, without, however, conceding that they had not suffered such damages. JA 59, 130. Cross-motions for summary judgment were denied by the District Court, Pet. App. 59a-69a, and that court denied respondents' motion for reconsideration, Pet. App. 70a-74a.

The District Court then certified two questions for appeal pursuant to 28 U.S.C. § 1292(b): "whether the imposition of liability on the media Defendants under [Title III and the Pennsylvania statute] solely for broadcasting the newsworthy tape . . ., when the tape was illegally intercepted and recorded by unknown persons who were not agents of Defendants, violates

the First Amendment; and (2) whether imposition of liability under the aforesaid . . . Statutes on Defendant Jack Yocum solely for providing the anonymously intercepted and recorded tape to the media defendants violates the First Amendment." Pet. App. 76a. Respondents Vopper, WILK and WGBI petitioned for permission to appeal, JA 62-65, and respondent Yocum filed an answer to the petition in which he joined the media defendants' request, JA 66. The Court of Appeals granted the petition for permission to appeal.

After the case had been briefed and argued, the Clerk of the Court of Appeals sent a letter to the United States Attorney, Pet. App. 77a-79a, providing notice pursuant to 28 U.S.C. § 2403(a), which grants the United States the right to intervene in any action "wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question." The United States accepted that invitation and filed a brief "to defend the constitutionality of Title III . . . as applied in this case." Brief for the United States in *Bartnicki, et al. v. Vopper, et al.*, No. 98-7156, at 1 (3d Cir.). PSEA was granted leave to file a brief *amicus curiae*, in which it defended the constitutionality of the state and federal statutes as applied to the conduct at issue in this case.

By a 2-1 vote, the Third Circuit reversed the District Court's order denying summary judgment to the defendants. The Court of Appeals announced its holding as follows: "We . . . hold that the [state and federal] Wiretapping Acts fail the test of intermediate scrutiny [under the First Amendment] and may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception." Pet. App. 42a.

In reaching that conclusion, the court "focus[ed] on the United States'. . . contention . . . that the provisions [of Title III prohibiting the disclosure or other use of intercepted communi-

cations] promote privacy by eliminating the demand for intercepted materials on the part of third parties." Pet. App. 33a. The Court of Appeals was "satisfied that this . . . justification does not rely on the communicative impact of speech and, therefore, that the Acts are properly treated as content-neutral." Pet. App. 28a. The court therefore "adopt[ed] the government's position that we should apply intermediate scrutiny [rather than strict scrutiny] in our analysis of the issue before us." *Id.* The Third Circuit held nonetheless that the challenged provisions cannot withstand such scrutiny.

Stating that "[t]he connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception is indirect at best," Pet. App. 33a, and noting that no evidence had been offered on the point, the Third Circuit majority was "not prepared to accept the United States' unsupported allegation that the statute is likely to produce the hypothesized effect." Pet. App. 34a. The court further declared that "the government's desired effect can be reached" by punishing those who "participated in the interception," making it unnecessary, in the Third Circuit's view, to allow recourse against third parties who disclose or otherwise use communications that they know, or have reason to know, were illegally intercepted by others. Pet. App. 35a. And the majority was "also concerned," Pet. App. 36a, that the statute might deter the media "from publishing even material that may lawfully be disclosed under the Wiretapping Acts," *id.*, because a reporter might be uncertain as to how the content of a communication was obtained.

The Third Circuit recognized that, separate and apart from whatever effect a prohibition of disclosure and other uses of intercepted communications may have in deterring interception in the first place, such a prohibition serves the government's "significant interest" in protecting privacy interests from *the harm caused directly by disclosure*, which "compound[s]" the "invasion of privacy" that is initiated by the unlawful interception of a communication. Pet. App.26a (quoting *Providence Journal*

Co. v. FBI, 602 F.2d 1010, 1013 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980)). But the majority declined to consider this justification for the challenged statutory provisions, other than to express the concern that, under such a rationale, the statutes' prohibition of disclosure might be "subject to strict scrutiny as a content-based regulation." Pet. App. 27a.

Judge Pollak, sitting by designation, dissented. He disagreed with the majority's view that "[t]he connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception is indirect at best." Pet. App. 50a ((Pollak, J., dissenting) (quoting Pet. App. 33a) (majority opinion)). And Judge Pollak sharply took issue with the majority's refusal to consider the compounding of injury that is caused by deliberate disclosure of an intercepted communication. As Judge Pollak saw it, "unauthorized disclosure (or other use) of private conversations is a central aspect of the very evil the challenged statutory provisions are designed to combat." Pet. App. 54a.

Petitioners Bartnicki and Kane moved for rehearing and suggested rehearing *en banc*, as did the United States. The petitions were denied, with the suggestion of rehearing *en banc* being rejected by a vote of 6 to 5. Pet. App. 82a-83a.

SUMMARY OF ARGUMENT

The question reserved in prior decisions of this Court as to whether the media or their sources might have a First Amendment privilege to disclose certain kinds of confidential information wrongfully obtained from private parties is presented here in a very narrow context.

Respondents have not been sued because of any facts or views they expressed, but because they broadcast the tape of an unlawfully intercepted private conversation. Furthermore, as the case comes to this Court, it must be assumed that respondents knew or had reason to know that the conversation had

been unlawfully intercepted. And no question is presented here as to the particular forms of damages that might be appropriate or permissible; nor does this case involve any question of prior restraint. The sole question presented is whether the First Amendment invalidates the wiretapping laws of the United States, Pennsylvania and some forty other States to the extent that those statutes make it unlawful for a person to distribute or broadcast a recording of a private conversation that the defendant knew or had reason to know was unlawfully intercepted.

I.

The challenged provisions are subject to intermediate First Amendment scrutiny, not strict scrutiny, for two reasons.

First, the statutes do not single out speech for any special prohibition; they prohibit any kind of use of an unlawfully intercepted communication. The case therefore is "controlled by . . . the . . . well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

Second, even considered in themselves, the anti-disclosure provisions are content-neutral. They do not "distinguish[ ]favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner Broadcasting System v. FCC*, 512 U.S. 622, 643 (1994). Rather, the proscriptions apply entirely irrespective of the subject of an intercepted communication or the viewpoint, if any, expressed in it; and they apply irrespective of the views or ideas, if any, expressed by the person who makes the unlawful disclosure. The challenged provisions thus do not " 'lend[ ] [themselves]' to being 'used for invidious thought-control purposes,' " *Hill v. Colorado*,120 S. Ct. 2480, 2493 (2000) (quoting *id.* at 2504 (Scalia, J., dissenting)). These statutes easily satisfy "[t]he principal inquiry in determining content neutrality," *Hill*, 120 S. Ct. at 2491, because this is not a case in

which "the government has adopted a regulation of speech because of disagreement with the message it conveys," *id.*

In previous cases where this Court has reviewed laws that prohibit disclosure of material not because of the subjects or views expressed, but because of the manner in which the material was obtained, the Court has applied, at most, intermediate scrutiny. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984); *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). On the other hand, the form of strict scrutiny the Court has applied in cases such as *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979), and *The Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989)—under which "a need to further a state interest of the highest order" must be shown before the government may punish a newspaper's publication of "truthful information" the newspaper "lawfully obtain[ed] . . . about a matter of public significance"—was developed by the Court as the appropriate mode of analyzing statutes that discriminated both on the basis of *content* (by prohibiting speech only on particular subjects) and on the basis of the *speaker* (by allowing information on the specified subjects to be disclosed by anyone other than the mass media or some segment thereof).

It is fully consistent with *Daily Mail* and *Florida Star* to recognize that, where a statute is content-neutral and speaker-neutral, "[t]o the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired." *Florida Star*, 491 U.S. at 534.

II.

The content-neutral and speaker-neutral statutes at issue here must, as applied, be "sustained if '[they] further[ ] an important or substantial governmental interest; if the governmental interest

is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Turner Broadcasting*, 512 U.S. at 662. That test is clearly satisfied.

As Congress found, interception of electronic communications is a serious national problem. More than ten million scanners—devices to intercept cellular telephone calls—are in use in this country, and interception of computer-generated communications also is well-known. The federal government and the States have a legitimate—indeed, a compelling—interest in protecting from such electronic surveillance the "expectation of . . . the confidentiality of . . . conversations . . . [,] to which we accord deference for the privacy of all citizens." *United States v. Nixon*, 418 U.S. 683, 708 (1974).

In acting to protect in this context the "right to be let alone," *Hill v. Colorado*, 120 S. Ct. at 2489 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)), the legislatures have promoted the "freedom *not* to speak publicly," which "serves the same ultimate end as freedom of speech in its affirmative aspect." *Harper & Row*, 471 U.S. at 559. As Congress recognized, without statutory protection for the privacy and security of electronic communications, individuals would be chilled from making free and full use of these important channels of communication.

To advance these substantial governmental objectives, it was necessary to prohibit not only the act of interception, but also the disclosure or other use of unlawfully intercepted communications by persons who know or have reason to know that a communication was unlawfully intercepted.

This was necessary, first, for the simple reason that "the invasion of privacy is [not] over and done with" when an interception occurs, but is "compound[ed]" by disclosure. *Gelbard v. United States*, 408 U.S. 41, 51-52 (1972). Whether the disclo-

sure is by the interceptor himself or by one through whom the intercepted communication has, in effect, been "laundered," the injury is the same. And the legislatures' speech-enhancing goal of increasing confidence in the security of electronic communications hardly could be attained by a statutory regime under which interceptors might (in the rare instances where they can be identified) be punished but the confidential communications they steal could be disclosed with impunity by third parties.

In addition, it was "surely reasonable," *Osborne v. Ohio*, 495 U.S. 103, 109 (1990), for the legislatures to act on the principle that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market." *New York v. Ferber*, 458 U.S. 747, 760 (1982). By "drying up the market" for unlawfully intercepted communications, the prohibitions of disclosure and other uses reduce the incentives to intercept electronic communications in the first place.

In this case, as in *Seattle Times, Harper & Row, Zacchini* and *Cohen*, the right of the media to gather and report news does not create a privilege to violate laws applicable to all citizens which protect legitimate interests in the confidentiality of communication and expression. The First Amendment does not make "private wiretapping" a legitimate source of news. *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972). To provide a cause of action to one injured by the broadcast of an unlawfully intercepted communication, where the broadcaster and his source knew or had reason to know that the communication was unlawfully intercepted, serves to promote, rather than to infringe, First Amendment values properly understood.

ARGUMENT

THE CHALLENGED PROVISIONS ARE CONTENT-NEUTRAL AND NECESSARY TO FURTHER THE IMPORTANT GOVERNMENTAL INTERESTS OF PROTECTING INDIVIDUALS FROM INTRUSION AND FOSTERING THE SECURITY THAT IS REQUIRED IF ELECTRONIC COMMUNICATION IS NOT TO BE CHILLED. THOSE PROVISIONS, AS APPLIED HERE, THEREFORE SATISFY THE FIRST AMENDMENT.

INTRODUCTION

At the outset, it is important to recognize that the question presented in this case is a narrow one.

1. Respondents challenged the statutes only as applied to their specific conduct—respondent Yocum's transmittal to the media respondents of a tape containing a recording of the entire intercepted conversation between petitioners Bartnicki and Kane, and the media respondents' broadcasts of that tape. Thus, no question is presented here as to whether, in the face of these statutes, the First Amendment would have protected respondents had they disclosed particular facts they learned from the tape without making public the actual verbatim recording of the unlawfully intercepted communication. *Cf. Harper & Row v. Nation Enterprises*, 471 U.S. 539, 556 (1985) (noting that the Copyright Act restricts publication of particular expression, but not of the facts or ideas expressed); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 569, 577 n.13 (1977) (noting distinction between broadcasting a tape of a performer's entire act and merely describing the act); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511-512 (1991) (noting that the use of a direct quotation may be injurious "regardless of the truth or falsity of the factual matters asserted within the quoted statement, . . . because the manner of expression or even the fact

that the statement was made indicates a negative personal trait").

2. Nor is any question presented here as to how the statutes should be applied to disclosures that occur after an intercepted communication has become public knowledge. Although the statutes are silent on the subject, it apparently was Congress' intent that "[t]he disclosure of the contents of an intercepted communication that had already become 'public information' or 'common knowledge' would not be prohibited." S. Rep. No. 90-1097, at 93. The special problems presented by such cases need not be considered here.

3. Furthermore, this case was decided on summary judgment proceedings in which, as the District Court determined, petitioners produced sufficient evidence to support their allegations that each respondent "knew or had reason to know that the private telephone conversation between Bartnicki and Kane was obtained surreptitiously through the illegal interception of their telephone conversation." JA 27 (Amended Complaint ¶¶ 17-18). *See* Pet. App. 68a (District Court decision). On appeal, "[t]he parties d[id] not challenge" the District Court's conclusion "that genuine disputes of material fact remain regarding . . . whether any or all of the defendants knew or had reason to know that th[e] conversation was illegally intercepted." Pet. App. 10a (Court of Appeals decision). Accordingly, as the case comes to this Court it must be taken as true that respondents disclosed "material they kn[e]w or ha[d] reason to know was illegally intercepted." Pet. App. 17a (Court of Appeals decision).

4. Petitioners have requested statutory damages and punitive damages (but not compensatory damages). *See supra* at 9. However, liability has not yet been found, and there have been no proceedings with respect to damages. Consequently, the Court is not called upon in this case to determine whether either the statute or the First Amendment makes any particular kind of damage award subject to special proof requirements or other

limitations. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-350 (1974) (limiting grounds for awarding presumed damages and punitive damages for defamation).

5. Even if the intercepted telephone conversation could be characterized as revealing plans to commit a crime—which is a fanciful interpretation of what was being expressed, *see supra* at 5 and n.1 – this case does not involve any communication with law-enforcement officials, and thus does not implicate "the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials." *Branzburg v. Hayes*, 408 U.S. 665, 698 (1972) (quoting *Roviaro v. United States*, 353 U.S. 53, 59 (1957)). Yocum took the tape of the conversation not to the police, but to a talk show host.

6. Finally, this case involves no prior restraint on publication or disclosure of information. *Cf. New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); *id.* at 725-726 (Brennan, J., concurring); *id.* at 730-731 (White, J., concurring); *id.* at 748 (Burger, C.J., dissenting); *id.* at 754, 759 (Harlan, J., dissenting); *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in Chambers) (staying injunction against broadcast of videotape footage obtained by an undercover camera, because "[s]ubsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for . . . misdeeds in the First Amendment context") (citing *New York Times v. United States).*

The sole question to be decided here is whether the First Amendment invalidates the state and federal wiretapping statutes to the extent that those statutes create a cause of action against a person for having distributed, or for having played to others, a recording of a conversation the defendant knew or had reason to know was unlawfully intercepted. As we will show, the statutes as so applied are subject only to intermediate scrutiny under the First Amendment, and they easily satisfy such scrutiny.

I. BECAUSE THE CHALLENGED PROVISIONS APPLY TO ALL UNLAWFULLY INTERCEPTED COMMUNICATIONS REGARDLESS OF THEIR CONTENT, THE PROVISIONS ARE SUBJECT ONLY TO INTERMEDIATE SCRUTINY

The provisions of 18 U.S.C. § 2511(1)(c) and 18 Pa. Cons. Stat. § 5703(2) that prohibit the intentional disclosure or other use of unlawfully intercepted communications are not "content-based speech restriction[s] [that] can stand only if [they] satisf[y] strict scrutiny." *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1886 (2000). Rather, these provisions are to be assessed under the familiar standard of intermediate scrutiny articulated in such cases as *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), and *United States v. O'Brien*, 391 U.S. 367 (1968): the provisions must be "sustained if '[they] further[ ] an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *Turner Broadcasting*, 512 U.S. at 662 (quoting *O'Brien*, 391 U.S. at 377)).

1. "Deciding whether a particular regulation is content-based [and hence subject to strict scrutiny] or content neutral [and subject only to intermediate scrutiny] is not always a simple task." *Turner Broadcasting*, 512 U.S. at 642. In this case, however, it is quite clear that the statutes are content-neutral.

a. In the first place, these statutes do not single out speech for any special prohibition; they proscribe not only publication, but any kind of "use" of a communication that the user (including even the government, *see* 18 U.S.C. § 2515) knows or has reason to know was obtained through unlawful interception. *See* 18 U.S.C. § 2511(1)(d); 18 Pa. Cons. Stat. § 5703(3). Indeed, the complaint in this action invokes the "use" prohibitions in tandem with the "disclosure" prohibitions. JA 27-29. The

case therefore is "controlled by . . . the . . . well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). The dissenters in *Cohen* agreed with the majority that such laws are not subject to strict scrutiny. *Id.* at 677 (Souter, J., dissenting) (stating that the proper approach is to "compare the competing interests involved . . . to determine the legitimacy of burdening constitutional interests").

b. Even if the challenged nondisclosure provisions are viewed in isolation rather than as part of a broader proscription of all uses of illegally intercepted communications, these provisions are content-neutral.

Under this Court's precedents, the question whether a law is content-neutral or content-discriminatory turns on whether the law imposes restrictions on "particular viewpoints" or particular "subject matter," *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537-538 (1980) – that is to say, whether the law "by [its] terms distinguish[es] favored speech from disfavored speech on the basis of the *ideas or views* expressed," *Turner Broadcasting*, 512 U.S. at 643 (emphasis added). *See also Hill v. Colorado*, 120 S. Ct. 2480, 2500 (2000) (Souter, J. concurring) (strict scrutiny applies if a law "suppress[es] discussion of a subject or a point of view").

Unlike laws that impose restrictions on speech because of the subjects or viewpoints expressed, the provisions at issue here "do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny." *Turner Broadcasting*, 512 U.S. at 661. The statutes' prohibitions apply entirely irrespective of the subject of an intercepted communication or the viewpoint, if any, expressed in it. Nor does liability turn on the views or ideas expressed by the

person who makes the unlawful disclosure. And the statutes apply to every kind of speaker, in every context and setting.[3]

Thus, unlike content-based statutes, the provisions at issue here do not "'lend[] [themselves]' to being 'used for invidious thought-control purposes.'" *Hill*, 120 S. Ct. at 2493 (opinion of the Court) (quoting *id.* at 2504 (Scalia, J. dissenting)).[4] And "[t]he principal inquiry in determining content neutrality," *id.* at 2491 (opinion of the Court), namely, " whether the government has adopted a regulation of speech because of disagreement with the message it conveys," *id.*,[5] is readily answered here: these statutes plainly were not adopted for such a reason.

2. This Court's decisions make it plain that a law which prohibits disclosure of material not because of its content, but because of the manner in which the material was obtained, is not subject to strict scrutiny.

[3] The content-neutrality inquiry here is thus more straightforward than in *Hill*, where the challenged statute, although not confined on its face to specified subjects, *was* confined to "protest, education, or counseling," which in turn arguably are associated with certain kinds of subjects. *See* 120 S. Ct. at 2504 (Scalia, J., dissenting). The statute in *Hill* also was confined to speech in certain locations, raising the possibility that the statute's selectivity might operate as a "[cl]ever content-based restriction[ ]." *Id.* at 2517 (Kennedy, J., dissenting). Nor is this a situation such as was presented in *Turner Broadcasting*, where an ostensibly neutral statute was based on legislative judgments that arguably embodied the government's preference for particular subject matters. *See* 512 U.S. at 676-677 (opinion of O'Connor, J.).

[4] *See also City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring) (strict scrutiny applies to "content-based speech restrictions [because such restrictions] are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate").

[5] *See also id.* at 2500-2501 (Souter, J., concurring) (same); *Turner Broadcasting*, 512 U.S. at 642 (same); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (same).

In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), a unanimous Court applied intermediate scrutiny in reviewing an order that prohibited dissemination of information obtained in discovery. *See id.* at 32. The Court emphasized that the order under review was predicated on the means through which the information in question had been obtained, and "the party may disseminate the identical information . . . as long as the information is gained through [other] means." *Id.* at 34.

Equally instructive are this Court's decisions reviewing laws that prohibit publication in order to protect economic interests in the material sought to be published. As in this case, liability under those laws is based solely on the extent to which a publication was derived from a particular source; and the Court has not subjected such laws to strict scrutiny. *See Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985) (Copyright Act); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (tort action against television station for misappropriating a performer's "right of publicity" by broadcasting a film showing his act).

So too, in applying strict scrutiny to a statute that prohibited a grand jury witness from "divulg[ing] information of which he was in possession before he testified before the grand jury," *Butterworth v. Smith*, 494 U.S. 624, 632 (1990), the Court explained that the less stringent test of *Seattle Times v. Rhinehart* would have been appropriate had the statute prohibited disclosure only of information "obtained as a result of . . . participation in the proceedings of the grand jury." *Butterworth*, 494 U.S. at 631-632. The Court thus applied strict scrutiny to a prohibition that may fairly be characterized as having been based on subject matter,[6] while indicating that intermediate scrutiny

[6] A prohibition of disclosure of information presented to a grand jury may be viewed as content-based because it is confined to information relating to the government's attempt to secure an indictment. What is more, that prohibition applies exclusively to statements made to a public body, and a body,

would apply if , as here, the prohibition were based solely on the means by which the information had been acquired.[7]

3. The foregoing analysis is perfectly consistent with the line of cases in which this Court has held that laws prohibiting the media from disclosing facts regarding specified subjects must satisfy a rule of strict scrutiny under which, "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979).

The cases governed by that rule all have involved laws or orders that prohibited *publication of facts pertaining to particular subjects specified by the government*, and nothing else. *See The Florida Star v. B.J.F.*, 491 U.S. 524, 526 n.1 (1989) (statute prohibited publication of "the name, address, or other identifying fact or information of the victim of any sexual offense"); *Daily Mail*, 443 U.S. at 98 (statute prohibited publication of the name of any youth charged as a juvenile offender); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (per curiam) (pretrial order enjoined members of news media from disclosing the name of a boy charged in a juvenile criminal proceeding); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 471 n.1 (1975) (statute prohibited publication of "the name or iden-

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moreover, that has as one of its chief functions "to safeguard citizens against an overreaching [government] and unfounded accusations." *Id.* at 629.

[7] *Cohen v. Cowles Media Co.* is yet another case in which the Court did not find strict scrutiny to be triggered by a law that prohibited publication of information, where the prohibition was predicated on the circumstances in which the information had been obtained. *See Cohen*, 501 U.S. at 671 (strict scrutiny not warranted where state law prohibited publication of the plaintiff's name because "respondents obtained Cohen's name only by making a promise that they did not honor").

tity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made").[8]

What is more, in those cases, not only did "the State . . . define[ ] the content of publications that would trigger liability," *Cohen*, 501 U.S. at 670, but the challenged restrictions *discriminated among speakers*: the publication ban was imposed only on the media, or on some segment thereof, while all others were left free to disclose the same information. *See Florida Star*, 491 U.S. at 526 n.1, 540 (statute applied only to "instrument[s] of mass communication"); *Daily Mail*, 443 U.S. at 98, 104-105 (newspapers); *Oklahoma Publishing*, 430 U.S. at 308 ("the news media"); *Cox Broadcasting*, 420 U.S. at 471 n.1 ("medi[a] of public dissemination"). That feature in itself called for heightened scrutiny. *See Turner Broadcasting*, 512 U.S. at 640-641.[9]

Nothing in the *Daily Mail* line of cases suggests that strict scrutiny is required where a law is addressed equally to all speakers and prohibits disclosure not because of the subject matter involved, but because of the manner in which the information was acquired. On the contrary, the Court recognized in *Florida Star* that "[t]he *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired

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[8] *See also Butterworth*, 494 U.S. at 632 (*Daily Mail* standard applied because the law prohibited disclosure of all information presented by a witness to a grand jury, even if the information was obtained through other means); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 831 (1978) (statute prohibited "divulg[ing] the identification of a Judge [who] was the subject of an investigation and hearing" before the state Judicial Inquiry and Review Commission).

[9] That the statute prohibited disclosure of information only by certain speakers and not by others was the sole ground on which Justice Scalia concurred in *Florida Star*, *see* 491 U.S. at 541-542 (opinion of Scalia, J.), and on which then-Justice Rehnquist concurred in *Daily Mail*, *see* 443 U.S. at 110 (Rehnquist, J., concurring in judgment).

unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." 491 U.S. at 535 n.8 (emphasis by the Court). The Court explained that, "[t]o the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired." *Id.* at 534.[10]

Thus, this case is "outside of the *Daily Mail* principle," and the challenged provisions are subject only to intermediate rather than strict scrutiny.

II. THE STATUTES AS APPLIED HERE SATISFY THE REQUISITE SCRUTINY

The state and federal prohibitions of disclosure or other use of unlawfully intercepted communications, as applied in this case, must be sustained because "[they] further[ ] an important or substantial governmental interest; . . . the governmental interest is unrelated to the suppression of free expression; and . . . the incidental restriction on alleged First Amendment freedoms is no greater than is essential the furtherance of that interest." *Turner Broadcasting*, 512 U.S. at 662 (quoting *O'Brien*, 391 U.S. at 377). Indeed, for the reasons that follow, these provisions would satisfy even the most strict First Amendment scrutiny.

A. The Statutes Were Enacted to Combat a Serious National Problem

In enacting Title III in 1968, Congress found that the growth of communications technology had been accompanied by "the

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[10] *See also Cox Broadcasting*, 420 U.S. at 489 (distinguishing tort doctrines under which liability turns on whether publicity is "offensive" from "an action for the invasion of privacy involving the appropriation of one's name or photograph, [or] a physical or other tangible intrusion into a private area").

widespread use and abuse of electronic surveillance techniques," through which "privacy of communication is seriously jeopardized" and "[e]very spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage." S. Rep. No. 90-1097 at 67. Congress therefore acted to prohibit the interception of any "wire or oral communication," and to prohibit as well the disclosure or other use of such intercepted communications by a person who knows or has reason to know that a communication was unlawfully intercepted. Pub. L. No. 90-351, § 802 (1968).

The 1968 statute did not expressly cover *electronic* communications, such as those conducted by cellular telephone or computer e-mail, and Congress soon came to recognize that those emerging technologies posed an even more severe threat to the security and privacy of communication.

Senator Leahy opened hearings in 1984 on "the electronic revolution [and its] effect on our lives and our sense of privacy" by noting that "[w]e send sophisticated legal documents, a bid, a love letter [electronically]. It makes no difference what it might be. People assume that—the average person assumes he is protected against wiretapping as they would as if they were on [a conventional] phone, but as a practical matter they are not. And what happens is a case where technology eats away at what we assume are our protections . . . . But I do not think that erosion of rights is inevitable." *Privacy in Electronic Communications: Hearings Before the Subcommittee on Patents, Copyrights and Trademarks, Senate Committee on the Judiciary*, 98th Cong., 2d Sess. 1-2 (1984) ("1984 Hearings") (Statement of Sen. Leahy). Senator Mathias similarly stated in the 1984 Hearings that "[t]he users of these new [technologies]—and that means all of us—expect legal protection against unwarranted interceptions of this communications stream, whether by overzealous law enforcement officers or private snoops." *Id.* at 3.

The next Congress passed the Electronic Communications Privacy Act ("ECPA"), amending Title III to cover electronic communications, so that "the new technological equivalents of telephone calls, telegrams, and mail are afforded the same protection provided to conventional communications." *Electronic Communications Privacy Act: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Senate Committee on the Judiciary*, 99th Cong., 1st & 2d Sess. 2 (1986) ("1986 Hearings") (Statement of Sen. Kastenmeier). Congress found the legislation necessary because "tremendous advances in telecommunications and computer technologies have carried with them comparable technological advances in surveillance devices and techniques," such that private information "may be open to possible wrongful use and public disclosure by . . . unauthorized private parties." S. Rep. No. 99-541, at 3.[11] To address that problem, Congress enacted "Federal statutory standards to protect the privacy and security of communications transmitted by new noncommon carrier communications services or new forms of telecommunications and computer technology," which "American citizens and American businesses are using . . . in lieu of, or side-by-side with, first class mail and common carrier telephone services." *Id.* at 5.

The particular kind of interception involved in this case—the use of a scanner to record a cellular telephone conversation—is, in itself, a major threat to the privacy and security of communications in our society. It is estimated that between ten and twenty million scanners are currently in operation in this country. Kimberly R. Thompson, *Cell Phone Snooping: Why Electronic Eavesdropping Goes Unpunished*, 35 Am. Crim. L. Rev. 137, 149 (1997). Even though it has been illegal since 1993 to manufacture scanners equipped with the capability to intercept cellular transmissions, *see* 47 U.S.C. § 302a(d), millions of scanners manufactured before that ban remain in use, and even scanners that comply with § 302a(d) can easily be modified to intercept cellular phone calls. 35 Am. Crim. L. Rev. at 151. Furthermore, as was pointed out in the 1984 Hearings, a person speaking on a conventional telephone is subject to having his conversation intercepted by a scanner if the other party to the call is using a cellular phone; and the person using the conventional phone generally will have no way of knowing that the other party is using a cellular phone. 1984 Hearings at 45, 47 (statement of Stephen Schachman on behalf of the Cellular Communications Industry Association).

[11] *See also id.* at 18 ("[S]ince Congress last addressed the issue of privacy communications in a comprehensive fashion, the technologies of communication and interception have changed dramatically, and are expected to continue to do so. These factors have raised serious issues about the protection of the privacy interests of U.S. citizens, which are of great concern to the Senate and the American people.")

The other principle forms of electronic communication with which these statutes are concerned—e-mail and other computer-generated communications—also are frequent targets of interception. There consequently can be no doubt as to the importance of the problem Congress addressed in the amended Title III, and that the legislatures of Pennsylvania and some forty other states have addressed in similar fashion.[12]

B. The Statutes Promote Important Governmental Interests Unrelated to the Suppression of Free Expression by Protecting Individuals From Unjustifiable Intrusion Into Their Private Communications, Thereby Avoiding a Chill on Free Expression and Promoting the Development and Use of New Technologies to Enhance Communication

It is apparent from what we have said to this point that these statutes promote important governmental interests.

[12] The state laws addressing this subject are described in the Addendum to this brief.

An individual's "expectation of . . . the confidentiality of his conversations" is a matter "to which we accord deference for the privacy of all citizens." *United States v. Nixon*, 418 U.S. 683, 708 (1974). That expectation is part of "the . . . 'right to be let alone' that one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men.'" *Hill v. Colorado*, 120 S. Ct. at 2489 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). This is "accurately characterized as an 'interest' that [the government] can choose to protect in certain situations," *Hill*, 120 S. Ct. at 2490 n.24; and it is precisely that interest that Congress and the Pennsylvania legislature have sought to protect in the statutes at issue here. *See* S. Rep. No. 90-1097, at 170 (Additional Views of Sen. Hart) ("[w]iretapping and other forms of eavesdropping are recognized . . . as encroachments on a man's right to privacy, characterized by Justice Brandeis as 'the most comprehensive of rights and the right most valued by civilized men'").[13]

It is difficult to conceive of a more fundamental assault on individual privacy and autonomy than the broadcast of a tape, made through surreptitious electronic surveillance, in which the participants to a private conversation speak unguardedly of their friends and adversaries, talk in deepest confidence of their strategy regarding a labor dispute, and even give out their telephone numbers.

But more than simple privacy is at stake here. The "freedom *not* to speak publicly," *Harper v. Row*, 471 U.S. at 559 (emphasis by the Court), which is promoted by these statutes, "serves the same ultimate end as freedom of speech in its affirmative

[13] As Senator Hart observed, in the 1967 State of the Union address, when President Johnson explained why the administration supported the legislation that became ECPA, he also quoted Justice Brandeis' famous statement. *Id.* at 172.

aspect," *id.*[14] That point was brought home to Congress in the 1967 report by the President's Commission on Law Enforcement and Administration of Justice, which played a crucial role in directing Congress' attention to the problems that were addressed the next year in Title III:

> In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas.
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> * * * * *
>
> External restraints, of which electronic surveillance is but one possibility, are thus repugnant to citizens of [a free] society.
>
> Today, in addition to some law enforcement agents, numerous private persons are utilizing these techniques.

President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 202 (Feb. 1967).

In the 1984 and 1986 Hearings, several witnesses explained in concrete terms why legal protection of the privacy and security of electronic communications is necessary if individuals are

[14] Just as "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'," *Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 573 (1995) (quoting *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 16 (1986)), it likewise is an important manifestation of the principle of free speech that one who chooses to speak may also decide to whom he will and will not convey a particular message. This "First Amendment right to exclude," *California Democratic Party v. Jones*, 120 S. Ct. 2402, 2407 n.5 (2000), applies both to speech and to association. *See Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2451 (2000); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

to have the confidence to make full and free use of these important channels of communication. An attorney for AT&T testified in the 1984 Hearings that "[a]ny undermining of this confidence would seriously impair the usefulness and value of telecommunications," and for that reason "we strongly oppose any invasion of the privacy of communications by illegal wiretapping and, accordingly, welcome Federal and State legislation that would comprehensively protect and strengthen such privacy." 1984 Hearings at 4 (Statement of H.W. William Caming, attorney for AT&T). In the 1986 Hearings, the point was driven home more explicitly, not only by representatives of industry,[15] but by the manager of the Communication and Technologies Program of Congress' Office of Technology Assessment, who testified as follows:

> There are two dangers in leaving this type of new application unprotected. One danger, of course, is a gradual erosion of privacy, a loss of the right to whisper and to keep our dealings confidential. The other danger is that we may

[15] *See e.g.*, 1986 Hearings at 93 (Statement of John W. Stanton, Chairman, Telocator Network of America, and Executive Vice President, McCaw Communications Co.) ("The absence of the law [extending Title III to electronic communications] has, and I believe will continue to inhibit the growth of the industry, and inhibit the improvement in technology . . . The inhibition of the growth of cellular technology and paging technology, forced by lack of privacy, is unfair because it precludes customers, potential customers, citizens, from getting access to a new technology that will provide service and allow them to live their lives more conveniently and in a better way"); *id.* at 39 (Statement of Philip J. Quigley, President and Chief Executive Officer, Pactel Mobile Co.) (cellular communication will "proliferate with further assurances of privacy"); *id.* at 155 (Statement of George A. Kuhnreich, Vice President, Tandy Corp.) ("As a practical matter, Tandy believes that the extension of privacy protection to cellular communication will help ensure the continued growth and vitality of the cellular industry. . . Tandy thus submits that the extension of privacy coverage of the cellular communications could well serve the dual goals of fostering competition among the communications services, and encouraging the utilization of the state-of-the-art technology").

> be denied useful applications and useful new technologies because they're unprotected. Consumers and users simply will not use these services if they are not properly protected, and they will not be developed and offered in the marketplace.
>
> * * * * *
>
> In-home and office information services – banking, videotex, and so on – might simply not be developed in the United States because consumers, concerned about their privacy, would not use them. If use of cellular telephones were to be inhibited because people were concerned about their privacy, the U.S. development of that technology could also be inhibited; resulting in a negative impact on our trade in these products and services.

1986 Hearings at 44, 70 (Statement of Frederick W. Weingarten, Communication and Information Technologies Program Manager, United States Congress Office of Technology Assessment).

In those hearings, Senator Leahy expressed the view that the proposed statute "will go a long way toward providing the legal protections of privacy and security which are necessary to ensure the continued growth of new communications technologies." *Id.* at 4. When the 1986 legislation was enacted, the Senate Report made the same point, observing that the lack of legal protection against interception "may unnecessarily discourage potential customers from using innovative communications systems . . . [and] may discourage American businesses from developing new innovative forms of telecommunications and computer technology." S. Rep. No. 99-541, at 5.

Petitioner Bartnicki's testimony in this case attests to the validity of Congress' concern. When asked whether the events here have "altered the way in which [she] uses [her cellular] phone," Ms. Bartnicki stated:

> Yes . . . I always think that there's somebody listening. I try to be extremely careful with what is said on the phone. It's cut down my efficiency in the job . . . because I use the phone quite a bit in my job and I hesitate to do that now. [JA 108]

By enacting provisions to address the serious problem of interception of electronic communications, Congress—and the forty state legislatures that have enacted similar laws —have protected the unquestionably important interest of individuals in being free from the intrusion of electronic surveillance, and in having a right of redress when such unlawful intrusion does occur. At the same time, by protecting the right of individuals *not* to speak *publicly*, the legislatures have *enhanced* the freedom of individuals to speak *privately*, and, in particular, to make use of new technologies that contribute both to the maximization of communication and to the advance of the economy. These plainly are "important or substantial governmental interest[s]," *Turner Broadcasting*, 512 U.S. at 662, "unrelated to the suppression of free expression," *id.*

C. The Prohibitions of Disclosure and Other Uses of Unlawfully Intercepted Communications Serve the Same Important Interests as the Interception Prohibition Itself, and are Necessary to Protect Those Interests

The points just made hold true not only with respect to the statutory prohibition of interception, but also with respect to the provisions prohibiting the disclosure or other use of communications that a person knows or has reason to know were unlawfully intercepted.

1. Disclosure of an intercepted communication harms the same interests as are harmed by the interception itself. As this Court explained in holding that a grand jury witness cannot be compelled to answer questions based upon the illegal interception of his communications, "contrary to the . . . assertion that

the invasion of privacy is over and done with" when the interception occurs, to require a witness to disclose the substance of an intercepted communication "compounds the statutorily prescribed invasion of . . . privacy by adding to the injury of the interception the insult of compelled disclosure." *Gelbard v. United States*, 408 U.S. 41, 51-52 (1972). "The protection of privacy—one of the purposes of Title III and [similar state] law[s]—requires strict controls on the repetition of the contents of illegally intercepted communications," *Nix v. O'Malley*, 160 F.3d 343, 351 (6th Cir. 1998), because "[e]ach time the illicitly obtained recording is replayed to a new and different listener, the scope of the invasion widens and the aggrieved party's injury is aggravated," *id.* (quoting *Fultz v. Gilliam*, 942 F.2d 396, 402 (6th Cir. 1991)). *See also Providence Journal Co. v. Federal Bureau of Investigation*, 602 F.2d 1010, 1013 (1st Cir. 1979) ("Congress' recognition of the victim's privacy as an end in itself recognizes that the invasion of privacy is not over when the interception occurs but is compounded by disclosure"), *cert. denied*, 444 U.S. 1071 (1980)).

Just as the intrusiveness of a Peeping Tom would be magnified if he were to invite others to look through a keyhole he had made, the intrusion worked by the interception of an electronic communication would be magnified if (to posit a situation which, remarkably, is not fanciful[16]) the operator of a scanner were to broadcast over a public address system what he is receiving. And, insofar as the nature of the injury is concerned, it matters not that, as here, the broadcast occurred at a time removed from the interception and the broadcaster was not the person responsible for the initial interception. The harm to the victim is precisely the same. "None of us is so circumspect in our speech that we can countenance the later use of our most

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[16] "One journalist writes of visits to 'garages, cafes and service stations where scanners were turned up to broadcast telephone conversations for the entertainment of customers and workers.' " 35 Am. Crim. L. Rev. at 150.

private utterances, played with the shattering impact of a broadcast in our own words." S. Rep. No. 90-1097, at 175 (Additional Views of Sen. Hart).

To recognize as much is not to countenance any form of content-discriminatory legislation; rather, it is to acknowledge that one of the principal reasons that our society recognizes a value in preventing intrusion into privacy is to protect personal autonomy in a manner that is shattered if the fruits of the intrusion are published to all the world. The statutory provisions challenged here that prohibit the disclosure and other use of unlawfully intercepted communications, regardless of their content, thus promote our citizens' "expectation of . . . the confidentiality of . . . conversations," *Nixon*, 418 U.S. at 708—their "right to be let alone," *Hill v. Colorado*, 120 S. Ct. at 2489.[17]

2. Congress and the Pennsylvania legislature were justified in proscribing the disclosure or other use of intercepted communications not only because such conduct—whether by the interceptor or a third party—compounds the kind of injury the legislatures properly sought to prevent, but also because these prohibitions are necessary to a coherent and effective enforcement scheme.

The danger that individuals will be afraid to make use of electronic communications media or will limit what they communicate over such media because of concerns about privacy and security would hardly be eased by a statutory regime under which interceptors might be punished but confidential information could be disclosed with impunity by third parties. And, as illustrated by this case and by *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *petition for cert. filed* (U.S. Apr. 25, 2000)

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[17] *Cf. Time Inc. v. Hill*, 385 U.S. 375, 384-385 n.9 (1967) (distinguishing cases where liability is based on the contents of a publication from cases involving "state power to sanction publication of matter obtained by an intrusion into a protected area, for example, through the use of electronic listening devices").

(No. 99-1709), among the millions of people who operate scanners in this country (to say nothing of those who attempt to pry into e-mail or other electronic communications) are many who are quick to pass along to others whatever items of interest their surveillance may uncover. To hold that such "laundering" of intercepted communications makes them fair game for disclosure would leave a gaping hole in the statutes.

What is more, as Congress was well aware, the identities of those directly involved in an unlawful interception "[a]ll too often . . . will go unknown." S. Rep. No. 90-1097, at 69. "It is not enough to prohibit disclosure only by those who conduct the unlawful eavesdropping," *Boehner*, 191 F.3d at 470, because such a restricted field of enforcement would mean that in many cases—such as this one—an unlawful interception could be followed by mass disclosure of the purloined communication and yet the victim would have no redress at all.

It also is very much to the point that, "[u]ness disclosure is prohibited, there will be an incentive for illegal interceptions." *Id.* Just as this Court has found it reasonable to assume that the Fourth Amendment exclusionary rule will "deter unreasonable searches," *Oregon v. Elstad*, 470 U.S. 298, 306 (1985), the Court has found it "surely reasonable," *Osborne v. Ohio*, 495 U.S. 103, 109 (1990), for a legislature to act on the principle that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market," *New York v. Ferber*, 458 U.S. 747, 760 (1982). By "drying up the market" for unlawfully intercepted communications, the prohibitions of disclosure and other uses reduce the incentives to intercept electronic communications in the first place.[18]

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[18] The Third Circuit refused "to accept the . . . allegation" that prohibiting disclosure and use will tend to deter interception, because no evidence was offered in support of that proposition. Pet. App. 33a-34a. However, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibil-

3. All of this being so, it is apparent that "the incidental restriction on alleged First Amendment freedoms" that flows from the challenged provisions "is no greater than is essential to the furtherance of [the government's substantial] interest[s]." *Turner Broadcasting*, 512 U.S. at 662.

To pass muster under the level of scrutiny that applies in this case, "a regulation need not be the least speech-restrictive means of advancing the Government's interests. 'Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." ' " *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)) (in turn quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). These statutes easily pass that test; indeed, they would satisfy even the least-restrictive-means requirement that obtains in cases of content discrimination where strict scrutiny is applied.

Insofar as disclosure is prohibited by these statutes because it "compounds the statutorily proscribed invasion of . . . privacy," *Gelbard*, 408 U.S. at 52, *see supra* at 34-35, it is obvious that the prohibition of disclosure is indispensable to advancing the government's legitimate interests.[19] And, to the extent that the

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ity of the justification raised." *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897, 900 (2000). The concept of "drying up the market" is surely plausible; and it is hardly novel, underlying as it does a host of statutes dealing with such matters as distribution of child pornography (*Ferber* and *Osborne*) and trafficking in stolen goods. Furthermore, it would be virtually impossible to develop empirical evidence to prove the extent to which prohibiting disclosure deters interception; no experiment could be conducted to yield such proof. Congress should not be required here to prove the unprovable.

[19] To suggest that the prohibition might better have been confined to disclosures of particular types of intercepted material would miss the point. Senator Hart's cogent observation that "[n]one of us is so circumspect in our speech that we can countenance the later use of our most private utterances,

prohibition is viewed as promoting free expression by enhancing the security of electronic communication, *see supra* at 36, or as serving to provide redress to victims of unlawful interception who otherwise would have no remedy, *see supra* at 37, or as tending to deter interception, *id.*, the proscription likewise "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Turner Broadcasting*, 512 U.S. at 662.

In sum, unless the special interests of the media and its sources are of such constitutional dimension as to trump even the most substantial governmental interests in preventing intrusion into private communications, Title III and the Pennsylvania statute, as applied in this case, must be substained. As we now show, there is no such media or informant privilege to traffic in stolen communications.

D. This Court's Decisions Establish that Where, as Here, a Communication is Protected as Confidential by a Content-Neutral Law, the Media Have No First Amendment Privilege to Broadcast that Communication

1. There is nothing new in the proposition that, where a content-neutral law protects a communication as confidential, the media have no First Amendment privilege to broadcast that communication.

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played with the shattering impact of a broadcast in our own words," S. Rep. 90-1097, at 175, is not confined to any limited set of subjects. Further, "[h]ere, the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive," *Hill v. Colorado*, 120 S. Ct. at 2497, and because any attempt to confine the disclosure prohibition to communications involving particular subjects or particular levels of sensitivity would raise problems of content discrimination. *Cf. Time, Inc. v. Hill, supra.*

In *Harper & Row*, The Nation Magazine argued vigorously that the First Amendment gave it the right to publish a highly newsworthy article drawn from the purloined and yet-to-be-published memoirs of President Ford. This Court disagreed, stating that, "[i]n our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression." 471 U.S. at 558. As the Court explained, by denying strangers the right to publish another's speech, the copyright laws promote the "freedom *not* to speak publicly, which serves the same ultimate end as freedom of speech in its affirmative aspect." *Id.* at 559. In that context, as here, a person's willingness to speak is enhanced by the knowledge that others cannot trespass on or traffic in his expression. Just as President Ford and his prospective publisher had a legitimate interest in seeking redress from The Nation for disclosing the contents of his memoirs without his permission, petitioners here have a legitimate interest in seeking redress from respondents for disclosing the contents of their unlawfully intercepted communication. In both cases, the legislation protecting those interests serves in the final analysis to promote First Amendment values. *Harper & Row*. *See also Zacchini*, *supra*.

So too, in *Seattle Times v. Rhinehart*, the interests served by an order protecting the confidentiality of information produced in civil discovery, including the possible impact on privacy if the information were disclosed, *see* 467 U.S. at 36-37, were held to justify a prohibition—indeed, a prior restraint—of a newspaper's publication of an article containing information of public concern that had been obtained through discovery. *See id.* at 22, 31-37. And in *Cohen v. Cowles Media Co.*, a state's interest in applying its law of promissory estoppel to enforce a promise of confidentiality given to a source in exchange for information was sufficient to warrant holding a newspaper liable for having published the individual's name, *see* 501 U.S. at 669-672, despite the fact that the identity of the individual—a political figure associated with a gubernatorial campaign—was of such public importance that "[a]n election could turn on just such a factor," *id.* at 678 (Souter, J., dissenting).

Harper & Row, *Seattle Times*, *Cohen* and this case are illustrations of the principle recognized in *Florida Star*, 491 U.S. at 534, that, "[t]o the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside the *Daily Mail* principle the publication of any information so acquired." In such a case, one need not doubt the importance of a free press or the need for "some protection for seeking out the news," *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), to recognize that, "[a]lthough stealing documents or private wiretapping could provide newsworthy information, *neither reporter nor source* is immune from conviction for such conduct, whatever the impact on the flow of news," *id.* at 691 (emphasis added). "The [First] Amendment does not reach so far as to override the interest of the public in ensuring that *neither reporter nor source* is invading the rights of other citizens through reprehensible conduct forbidden to all other persons." *Id.* at 691-692 (emphasis added). Our Constitution simply does not require that we tolerate "a private system of informers" to gather the news, *id.* at 697, and such a system "would pose a threat to the citizen's justifiable expectations of privacy," *id.*[20]

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[20] In enacting Title III, Congress was cognizant of the legitimate needs of the media, and Congress was sensitive to First Amendment values. Indeed, Congress clarified the statutory provision that generally allows recording of a communication by a party to the communication without the consent of the other party, *see* 18 U.S.C. § 2511(2)(d), so as not to "place[ ] a stumbling block in the path of . . . scrupulous journalist[s]." S. Rep. No. 99-541, at 17. The Senate Report explained that "[m]any news stories have been brought to light by recording a conversation with the consent of only one of the parties involved—often the journalist himself." *Id.* The Report stated that even if such a news story proved "embarrassing to someone," *id.*, the journalist should not face a threat of liability for such "responsible news-gathering ac-

2. Nothing in the *Florida Star* line of cases casts any doubt on these principles.

In the first place, as we have explained, each of those cases involved a law that (a) prohibited publication and nothing else, (b) applied only to the media or some segment thereof, and (c) banned the publication of information on specifically designated subjects. For those reasons, the laws were presumptively unconstitutional and were subject to strict scrutiny. *See supra* at 24-26. The statutes before the Court in this case are not of such a nature.

Second, in none of the *Florida Star* line of cases did the challenged laws serve to *promote* open communication or other free speech values, as is the case here. *See supra* at 30-34, 40.

Finally, to the extent that the laws in *Florida Star* and its precursors may have involved interests at all akin to those involved here,[21] the laws failed strict scrutiny not because the Court

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tivities," *id.*, because "[s]uch a threat is inconsistent with the guarantee of the first amendment," *id.*

Interception of an electronic communication such as occurred in this case is, of course, fundamentally different from the situation where a party to a telephone conversation knows that the other party may repeat (or even record) what is said. Interception by electronic surveillance is "a classic case of the invisible third party whose presence is not detectable by anyone involved in the conversation." Diane L. Zimmerman, *I Spy: The Newsgatherer Under Cover*, 33 U. Rich L. Rev. 1185, 1232 n. 144 (2000).

[21] Any such kinship is quite distant. None of those cases involved any interest in being free from electronic surveillance or any other form of unlawful intrusion. On the contrary, in *Cox Broadcasting* the Court observed that, although "[there] are impressive credentials for a right of privacy," 420 U.S. at 489, the case presented there did not involve "intrusion," but rather a cause of action for disclosing information that, because of its content, "would be offensive to a person of ordinary sensibilities," *id.* In *Daily Mail*, "there [wa]s no issue . . . of privacy," 443 U.S. at 105; rather, the interest proffered by the state was one of "further[ing] [the] rehabilitation" of juvenile offend-

deemed those interests unimportant, but because the challenged laws could not fairly be portrayed as serving such interests in any meaningful way.

In each of those cases, the information at issue had been provided to the media *by the government itself*. *See Florida Star*, 491 U.S. at 527 (reporter obtained the name of a rape victim from a police report that was publicly available in the police pressroom); *Daily Mail*, 443 U.S. at 99 (reporters obtained the name of a juvenile offender "simply by asking various witnesses, the police, and an assistant prosecuting attorney"); *Oklahoma Publishing*, 430 U.S. at 309, 311 (reporter learned the name of a juvenile offender from a proceeding in open court); *Cox Broadcasting*, 420 U.S. at 472-73 (reporter learned the name of a rape victim from "public records available for inspection").

Thus, as the *Florida star* Court took pains to emphasize, the laws under attack in those cases simply were not needed in order to protect confidentiality, because the government could have provided the desired protection by not divulging the information in the first place. *See* 491 U.S. at 534. As the Court further explained, the fact that the government *did* divulge the information—and that it permitted all persons other than certain segments of the media to publicize the information—belied the government's contention that its selective ban on publication was a narrowly tailored means of protecting confidentiality. *Id.* at 535-536, 538, 540 (opinion of the Court); *id.* at 541-542 (opinion of Scalia, J.). No such irrationality afflicts the statutes involved here.

Furthermore, the law in *Florida Star* had no scienter requirement. *Id.* at 539 (opinion of the Court). The provisions here, in contrast, apply only to a defendant who "know[s] or ha[s] rea-

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ers, *id.* at 104. *See also Landmark Communications*, 435 U.S. at 840-842 (interests of judicial administration).

son to know" that the communication he is disclosing was unlawfully intercepted. Those terms certainly can be construed to satisfy any First Amendment requirements that might be deemed applicable. We submit that it would be sufficient in that regard to construe "reason to know" in its ordinary sense, as meaning "that the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists." Restatement (Second), Torts, § 12(1). *See Novicki v. Cook*, 946 F.2d 938, 941-942 (D.C. Cir. 1991) (applying the Restatement definition in construing "reason to know" in a federal statute, and holding that the phrase is *not* to be equated with "should have known," and that it "imposes no duty of inquiry"). Because respondents did not challenge on appeal the District Court's determination that, for purposes of their motion for summary judgment, they must be deemed to have known or to have had reason to know that the Bartnicki/Kane conversation had been unlawfully intercepted, *see supra* at 18, the Court need not decide in this case whether, as a matter of statutory construction or First Amendment mandate, the Restatement formulation of "reason to know," or some other formulation, is the appropriate one to apply in this context.[22]

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The Third Circuit's myopic refusal to acknowledge the substantial governmental interests served by these provisions stands in sharp contrast to the assessments of the other two Circuits that have considered the matter.

In *Boehner*, 191 F.3d at 470, the D.C. Circuit summed things up as follows:

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[22] Nor is any question presented here as to whether a more demanding scienter standard might properly be required for particular kinds of damage awards. *See supra* at 18-19.

> Unless disclosure is prohibited, there will be an incentive for illegal interceptions; and unless disclosure is prohibited, the damage caused by an illegal interception will be compounded. It is not enough to prohibit disclosure only by those who conduct the unlawful eavesdropping. One would not expect them to reveal publicly the contents of the communication; if they did so they would risk incriminating themselves. It was therefore "essential" for Congress to impose upon third parties, that is, upon those not responsible for the interception, a duty of nondisclosure.

And in *Peavy v. WFAA-TV, Inc.*, No. 99-10272, 2000 U.S. App. LEXIS 18289, at *97-*98 (5th Cir. July 31, 2000), the Fifth Circuit concluded:

> The use and disclosure proscriptions do not burden substantially more speech than is necessary to further governmental interests in protecting the privacy of communications. Those interests would be achieved less effectively in the absence of such proscriptions, because the invasion of privacy that occurs with interception does not then end, but continues anew and spreads with each disclosure or other use of the interception.
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> Prohibiting interception alone is not sufficient to protect the privacy of communications. Without the use and disclosure proscriptions, government's efforts to prohibit interception would be far less effective, because a person who illegally intercepts a conversation and wishes to disclose it to the public can do so, at no risk to himself, by simply anonymously providing the contents of the communication—by use of a tape or otherwise—to third parties, such as the media, who have an interest in disclosing, or otherwise using, those contents (as in *Bartnicki*). Moreover, far greater damage to the interests sought to be protected results if, and when, such contents are paraded before the public through use and disclosure by non-interceptors, including the media.

The Third Circuit's opinion, which improperly insists on empirical proof of the deterrent effect of the anti-disclosure provisions and simply declines to consider the other manifestly important functions of the challenged provisions, provides no response to these points. Under the level of scrutiny that is appropriately applied to these content-neutral statutes (indeed, even under strict scrutiny), the provisions must be upheld because they advance important governmental interests that, far from being calculated to suppress free speech, serve to promote core First Amendment values.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

JEREMIAH A. COLLINS
(Counsel of Record)
BREDHOFF & KAISER, P.L.L.C.
805 15th Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 842-2600

RAYMOND P. WENDOLOWSKI
SCOTT C. GARTLEY
CYNTHIA R. VULLO
KOFF, WENDOLOWSKI, FERGUSON & MAGAN
22 East Union Street, Suite 115
Wilkes-Barre, P.A. 18701-2721
(570) 822-5600

ADDENDUM

STATE STATUTES PROHIBITING THIRD-PARTY DISCLOSURE OR USE OF UNLAWFULLY INTERCEPTED COMMUNICATIONS

The following state statutes prohibit the disclosure and/or use of intercepted communications, without confining the prohibition to those individuals involved in the interception:*

Ala. Code §§ 13A-11-30 *et seq.* (1975) (making it illegal to "use[] or divulge[] information obtained through criminal eavesdropping, " with "criminal eavesdropping" defined as "intentionally using any device" to "overhear, record, amplify or transmit any part of the private communication of others without the consent of at least one of the persons engaged in the communication").

Alaska Stat. § 42.20.300(d) (Michie 1999) (person who has received or "become acquainted with" a "communication and who knows or reasonably should know that the communication and the information contained in it was obtained [unlawfully] may not divulge or publish the existence, contents, substance, purport, effect, or meaning of the communication or any part of the communication"); *id.* § 42.20.310 (making it illegal to "use or divulge any information which the person knows or reasonably should know was obtained through the illegal use of an eavesdropping device for personal benefit or another's benefit" or to "divulge, or publish the existence, contents, substance, purport, effect, or meaning of any conversation the

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* Some of the listed statutes are not explicit with regard to whether the prohibitions apply to persons not involved in an interception; and some are not explicit with regard to whether electronic communications are covered.

In addition to the listed statutes, two States have enacted non-disclosure provisions that apply only where an employee of a communication service provider is involved. *See* Ariz. Rev. Stat. Ann. § 13-3006(1) (West 1989 & Supp. 1999); Conn. Gen. Stat. Ann. § 53a-188 (1994). Indiana limits the disclosure of *lawfully* intercepted communications. *See* Ind. Code § 35-33.5-5-3(a) (Michie 1998) (law enforcement officers); *id.* § 35-33.5-3(c) (other persons).

person has become acquainted with after the person knows or reasonably should know that the conversation and the information contained in the conversation was obtained through the illegal use of an eavesdropping device," and defining "eavesdropping device" as any device, except hearing aids, "capable of being used to hear or record oral conversation whether the conversation is conducted in person, by telephone, or by any other means").

Ark. Code Ann. § 5-60-120 (Michie 1997) (making it unlawful to "possess a recording" of a "wire, oral or telephonic communication" unless a party consented to the interception and recording of the communication).

Cal. Penal Code § 631 (West 2000) (making it illegal to "use[] * * * information" obtained via "unauthorized connection, whether physically, electrically, acoustically, inductively, or otherwise, with any telegraph or telephone wire, line, cable, or instrument," or obtained via "read[ing]" or "learn[ing] the contents or meaning of any message, report, or communication while the same is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place within" California).

Colo. Rev. Stat. § 18-9-303 & 305 (1998) (person commits wiretapping if he "[k]nowingly uses for any purpose or discloses to any person the contents of any [intercepted] communication, or attempts to do so, while knowing or having reason to know the information was obtained" unlawfully).

Del. Code Ann. tit. 11, § 1336(b)(1) (1995) (making it illegal to "willfully disclose" or "willfully use * * * the contents of any wire or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire or oral communication"); *id.* § 1336(w) (providing private right of action).

D.C. Code Ann. § 23-542 (1996) (imposing criminal penalties on any person who "willfully discloses [or] willfully uses * * * the contents of any wire or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication"); *id.* § 23-554 (providing private right of action).

Fla. Stat. Ann. § 934.03(1) (West 1996 & Supp. 2000) (prohibiting the "[i]ntentional[] use[] or disclos[ure of] the contents of any wire, oral, or electronic communication" by any person "knowing or having reason to know that the information was [unlawfully] obtained through the interception of a wire, oral, or electronic communication"); *id.* § 934.10 (providing private right of action).

Ga. Code Ann. § 16-11-66.1 (1999) (making it unlawful to "broadcast, print, or publish the contents of any communication transmitted between cellular radio telephones or between any cellular radio telephone and a landline telephone if the communication has been [unlawfully] intercepted").

Haw. Rev. Stat. Ann. § 803-42 (Michie 1999) (forbidding any person to "[i]ntentionally use[]" or "intentionally disclose[] * * * the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire, oral, or electronic communication"); *id.* § 803-48 (providing private right of action).

Idaho Code § 18-6702 (1997) (making it illegal to "willfully disclos[e]" or "willfully us[e] * * * the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire or oral communication"); *id.* § 18-6709 (providing private right of action).

720 Ill. Comp. Stat. Ann. 5/14-2(b) (West 1993 & Supp. 2000) (person commits eavesdropping when he "[u]ses or

divulges * * * any information which he knows or reasonably should know was obtained through the use of an eavesdropping device," with "eavesdropping device" defined as "any device capable of being used to hear or record oral conversation or intercept, retain, or transcribe electronic communications," excluding hearing aids); *id.* 5/14-6 (providing private right of action).

Iowa Code Ann. § 808B.2 (West 1994 & Supp. 2000) (making it illegal to "[w]illfully disclose[]" or "[w]illfully use[] * * * the contents of a wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire, oral, or electronic communication"); *id.* § 808B.8 (providing private right of action).

Kan. Stat. Ann. § 21-4002 (1995) (forbidding the "[d]ivulging, without the consent of the sender or receiver, [of] the existence or contents of [a] message if such person knows that the message was illegally intercepted, or if such person illegally learned of the message in the course of employment with an agency in transmitting it"); *id.* § 22-2518 (providing private right of action).

Ky. Rev. Stat. Ann. § 526.060 (Michie 1999) ("A person is guilty of divulging illegally obtained information when he knowingly uses or divulges information obtained through eavesdropping or tampering with private communications or learned in the course of employment with a communications common carrier engaged in transmitting the message.").

La. Rev. Stat. Ann. tit. 15, § 1303 (West 1992) (making it illegal to "[w]illfully disclose" or "[w]illfully use * * * the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire or oral communication"); *id.* § 1312 (providing private right of action).

Me. Rev. Stat. Ann. tit. 15, § 710(3) (1980 & Supp. 1999) (imposing penalties upon person who "[i]ntentionally or knowingly discloses" or "[i]ntentionally or knowingly uses * * * the contents of any wire or oral communication, knowing that the information was obtained through interception"); *id.* § 711 (providing private right of action).

Md. Code. Ann., Cts. & Jud. Proc. § 10-402 (1995) (making it illegal to "[w]illfully disclose" or "[w]illfully use * * * the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire, oral, or electronic communication"); *id.* § 10-410 (providing private right of action).

Mass. Ann. Laws ch. 272, § 99(C)(3) (Law. Co-op. 1992 & Supp. 1998) (forbidding any person to "willfully disclose[]" or "willfully use[] * * * the contents of any wire or oral communication, knowing that the information was obtained through interception"); *id.* § 99(Q) (providing private right of action).

Mich. Comp. Laws Ann. § 750.539e (West 1991) ("Any person who uses or divulges any information which he knows or reasonably should know was obtained [through unlawful eavesdropping] is guilty of a felony * * * ."); *id.* § 750.539h (providing private right of action, but permitting actual damages only against person who eavesdrops).

Minn. Stat. Ann. § 626A.02 (West 1983 & Supp. 2000) (making it illegal to "intentionally disclose[]" or "intentionally use[] * * * the contents of any wire, electronic, or oral communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire, electronic, or oral communication"); *id.* § 626A.13 (providing private right of action).

Mo. Ann. Stat. § 542.402 (West 1987 & Supp. 2000) (person commits felony if he "[k]nowingly discloses" or "[k]nowingly

uses * * * the contents of any wire communication, when he knows or has reason to know that the information was obtained through the [unlawful] interception of a wire communication"); *id.* § 542.418 (providing private right of action).

Neb. Rev. Stat. Ann. § 86-702 (Michie 1995) (making it illegal to "intentionally disclose" or "intentionally use * * * the contents of any wire, electronic, or oral communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire, electronic, or oral communication"); *id.* § 86-707.02 (providing private right of action).

Nev. Rev. Stat. Ann. § 200.630 (Michie 1997) ("[A] person shall not disclose the existence, content, substance, purport, effect or meaning of any wire or radio communication to any person unless authorized to do so by either the sender or receiver."); *id.* § 200.690 (providing private right of action).

N.H. Rev. Stat. Ann. § 570-A:2 (1986) (making it illegal to "[w]ilfully disclos[e]" or "[w]ilfully use[] * * * the contents of any telecommunication or oral communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a telecommunication or oral communication"); *id.* § 570-A:11 (providing private right of action).

N.J. Stat. Ann. § 2A:156A-3 (1985 & Supp. 1999) (forbidding any person to "[p]urposely disclose[]" or "[p]urposely use[] * * * the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication"); *id.* § 2A:156A-24 (providing private right of action).

N.M. Stat. Ann. § 30-12-1 (Michie 1994) (prohibiting the "knowing[] * * * reading, interrupting, taking or copying [of] any message, communication or report intended for another by

telegraph or telephone without the consent of a sender or intended recipient thereof"); *id.* § 30-12-11 (providing private right of action).

N.C. Gen. Stat. § 15A-287 (1999) (making it illegal to "[w]illfully disclose[] * * * the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained" unlawfully, or to "[w]illfully use[] * * * the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire or oral communication"); *id.* § 15A-296 (providing private right of action).

N.D. Cent. Code § 12.1-15-02 (1997) (forbidding any person to "[i]ntentionally disclose[] to any other person or intentionally use[] the contents of any wire or oral communication, knowing that the information was obtained through the interception of a wire or oral communication").

Ohio Rev. Code Ann. § 2933.52(A)(3) (Anderson 1996) (criminalizing the "purpose[ful] * * * [u]se[of] the contents of a wire, oral, or electronic communication, knowing or having reason to know that the contents were obtained through the [unlawful] interception of a wire, oral, or electronic communication"); *id.* § 2933.65 (providing private right of action).

Okla. Stat. Ann. tit. 13, § 176.3 (West 1994) (making it illegal to "[w]illfully disclose[]" or "[w]illfully use[] * * * the contents of any wire, oral or electronic communication, knowing or having reason to know that the information was obtained" unlawfully).

Or. Rev. Stat. § 165.540 (1997 & Supp. 1998) ("no person shall * * * [u]se * * * or divulge to others any conversation, telecommunication or radio communication obtained" illegally).

18 Pa. Cons. Stat. Ann. § 5703 (West 2000) (making it illegal to "intentionally disclose[]" or "intentionally use[] * * * the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication"); *id.* § 5725 (providing private right of action).

R.I. Gen. Laws § 11-35-21 (1994 & Supp. 1999) (authorizing imprisonment for any person who "willfully discloses" or "willfully uses * * * the contents of any wire, electronic, or oral communication, knowing, or having reason to know, that the information was obtained through [unlawful] interception of a wire, electronic, or oral communication").

Tenn. Code Ann. § 39-13-601 (1997) ("a person commits an offense who * * * [i]ntentionally discloses" or "[i]ntentionally uses * * * the contents of any wire, oral or electronic communication, knowing or having reason to know, that the information was obtained through the [unlawful] interception of a wire, oral or electronic communication"); *id.* § 39-13-603 (providing private right of action); *see also id.* § 39-13-604(b)(1) ("A person commits an offense who, without the consent of at least one (1) party to a communication, intentionally records or disseminates a communication transmitted between two (2) cellular radio telephones, a cellular radio telephone and a landline telephone, or a cordless telephone and a cellular radio telephone."); *id.* § 39-13-604(b)(2) ("A person commits an offense who intentionally disseminates a communication transmitted between two (2) cordless telephones or a cordless telephone and a landline telephone if such dissemination is not authorized by a court order.").

Tex. Penal Code Ann. § 16.02 (West 2000) ("A person commits an offense if he * * * intentionally discloses * * * the contents of a wire, oral, or electronic communication if he knows or has reason to know the information was obtained through the [unlawful] interception of a wire, oral, or electronic

communication in violation of this subsection," or "intentionally uses * * * the contents of a wire, oral, or electronic communication if he knows or is reckless about whether the information was obtained through the [unlawful] interception of a wire, oral, or electronic communication * * * ."

Utah Code Ann. § 77-23a-4 (1999) (making it illegal to "intentionally or knowingly disclose[]" or "intentionally or knowingly use[] * * * the contents of any wire, electronic, or oral communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire, electronic, or oral communication"); *id.* § 77-23a-11 (providing private right of action).

Va. Code Ann. § 19.2-62 (Michie 1995) (making it illegal to "[i]ntentionally disclose[]" or "[i]ntentionally use[] * * * the contents of any wire, electronic or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication"); *id.* § 19.2-69 (providing private right of action).

W.Va. Code § 62-1D-3 (1997) (forbidding any person to "[i]ntentionally use or disclose * * * the contents of any wire, oral or electronic communication or the identity of any party thereto, knowing or having reason to know that such information was obtained through the [unlawful] interception of a wire, oral or electronic communication"); *id.* § 62-1D-12 (providing private right of action).

Wis. Stat. Ann. § 968.31(1) (1998) (making it illegal to "[d]isclose[]" or "[u]se * * * the contents of any wire, electronic or oral communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire, electronic or oral communication"); *id.* § 968.31(2m) (providing private right of action).

Wyo. Stat. Ann. § 7-3-602 (Michie 1995 & Supp. 1999) ("no person shall willfully * * * [d]isclose" or "[u]se the contents of any wire, oral or electronic communication knowing or having

reason to know that the information was obtained through the [unlawful] interception of a wire, oral or electronic communication"); *id.* § 7-3-609 (providing private right of action).